86 1822

NO.

Supreme Court, U.S.
FILED
MAY 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1986

Christopher THOMPSON
Plaintiff-Appellee-Petitioner

v.

SOUTHERN PACIFIC TRANSPORTATION CO., d/b/a
SOUTHERN PACIFIC RAILROAD CO., et al.
Defendants,

Monsanto Corporation,
Defendant-Appellant-Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Of Counsel:
BECNEL, LANDRY,
AND BECNEL
RESERVE, LOUISIANA

DANIEL E. BECNEL, JR.
109 West Seventh Street
Post Office Drawer H
Reserve, LA 70084
(504) 535-1186
or 536-7904

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals error in reversing the judgment of United States District Court by finding that there was insufficient evidence to establish causation between defendants exposure to dioxin at the industrial plant site and his subsequent development of porphyria.

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioner: Christopher Thompson

Respondent: Monsanto Corporation

TABLE OF CONTENTS

Page

Question Presented for Review.....i

List of all Parties.....ii

Table of Contents.....iii

Table of Authorities.....iv

Petition for Writ.....1

Opinions Below.....2

Jurisdiction.....2

Constitutional Provision Involved.....3

Statutes Involved.....3

Statement of the Case.....3

Argument for Granting Certiorari.....5

Coinclusion.....8

Certificate of Service.....9

Appendix A

Opinion of the 5th Circuit Court of Appeals.....A-1

Appendix B

Original Judgment of Trial Court.....A-7

Minute Entry of Trial Court's Denial of Motions Judgment Notwithstanding Verdict.....A-8

Trial Court Judgment in Accordance with opinion of the Fifth Circuit.....A-11

TABLE OF AUTHORITIES

Cases: Page

Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed. 606 (1982).....5

Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed. 2d 518 (1985).....6

Boeing v. Shipmanm, 411 F.2d 365 (5th Cir. 1969).....6

In re Air Crash Disaster Near New Orleans, 767 F.2d 1151 (1985).....7

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NO.

Christopher THOMPSON
Plaintiff-Appellee-Petitioner

v.

SOUTHERN PACIFIC TRANSPORTATION CO., d/b/a SOUTHERN PACIFIC RAILROAD CO., et al.
Defendants,

Monsanto Corporation,
Defendant-Appellant-Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES AND THE JUSTICES THEREOF:

Petitioner, Christopher Thompson, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in this cause, specifically, its opinion of February 13, 1987.

OPINIONS BELOW

Opinion of the United States Court of Appeals for the Fifth Circuit, *Thompson v. Southern Pacific Transportation Co.*, is reported in Snopsis, Syllibi and Key Number Classification Copyright 1987 by West Publishing Co. at page 2301 and is reprinted as Appendix A hereof.

The original judgment of the United States Court for the Eastern District of Louisiana, and the Minute Entry of the Courts ruling on defendant's motion for a judgment notwithstanding verdict are unreported and are printed as appendix B hereof.

The judgment of the United States Court for the Eastern District of Louisiana in accordance with the opinion of the Court of Appeals is unreported and is printed as Appendix B. hereof.

JURISDICTION

This Petition for Writ comes as the result of the opinion and judgment of the United States Court of Appeals for the Fifth Circuit dated February 13, 1987.

The jurisdiction of this Honorable Court is invoked under Title 28 United States Code, Sections 1254.

Article 3, section 2 of the United States Constitution, provides:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made or which shall be made under their authority;...to

> controversies ... between citizens of different States...

STATUTES INVOLVED

Louisiana Civil Code Article 2315 providing:

> Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.
>
> Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective catagories of persons who would have had a cause of action for wrongful death of an injured person.

Louisiana Civil Code Article 2317 providing:

> We are responsible not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of things we have in our custody. This, however, is to be understood with the following modifications.

STATEMENT OF THE CASE

Christopher Thompson (Petitioner) filed his Complaint in this case on April 17, 1981, alleging that during the course of his employment with Southern Pacific Railroad, he frequently entered the Monsanto plant at Luling, Louisiana, where he was caused to suffer a severe and permanently disabling occupational disease called porphyria cutanea tarda.

Mr. Thompson alleged that Monsanto (Respondent) was negligent in:

a.) Manufacturing, processing or storing a defective and believed to be hazardous product called hexachlorobenzene and/or other chemicals and,

b.) Failure to warn of the hazard of exposure to hexachlorobenzene and/or other chemicals.

Mr. Thompson further alleged that Monsanto is liable to him under Article 2317 of the La. Civil Code as a result ofits having custody over certain allegedly hazardous chemicals, including hexachlorobenzene.

A trial date was originally scheduled for August 30, 1982, in the United States District Court for the Eastern District of Louisiana. After several delays and continuances, Trial began on Thursday, October 28, 1985. The jury heard two days of testimony and the court then continued the trial, leaving a sitting jury, until resumption of the trial on October 28, 1985. After trial, the jury rendered in favor of Mr. Thompson in the amount of $200,000.00, which verdict was made the judgment of the Court on November 5, 1985. The court denied Monsanto's motions for post-trial relief on December 5, 1985, and Monsanto appealed to the U.S. Fifth Circuit Court of Appeals.

The United States Court of Appeals for the Fifth Circuit reversed the judgment of the trial court in an opinion on February 13, 1987. It is from this reversal that petitioner seeks redress in this Honorable Court.

FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

The parties to this action are citizens of different states of the United States and the amount in controversy is over $10,00.00 The United States District Court for the Eastern District of Louisiana had jurisdiction in this matter pursuant to 28 U.S.C 1332.

ARGUMENT FOR GRANTING CERTIORARI

THE OPINION OF WHICH PETITIONER SEEKS REVIEW, BY NOT GRANTING SUFFICIENT DEFERENCE TO THE TRIER OF FACT, INCORRECTLY APPLIES THE STANDARD OF REVIEW BY APPELLATE COURTS OVER THE MATTER OF SUFFICIENCY OF EVIDENCE IN DIVERSITY CASES.

It is well settled in the federal jurisprudence that the trier of fact is to be granted much deferences as to matters of fact, which matters include the sufficiency of evidence.

In *Inwood Laboratories v. Ives Laboratories,* 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606, (1982) it was held:

> Determining the weight and credibility of the evidence is the special provence of the trier of fact.

The Fifth Circuit, stating that it was "deferring fully to the jury's prerogatives" found that petitioner

> did not introduce sufficient evidence at trial to establish a link of causation between his alleged

exposure to dioxin at Luling and the development of his porphyria.

Petitioner disagrees with this assessment of the evidence introduced at the trial. The jury found that plaintiff's verdict should not have been overturned by the evidence. Their verdict should not have been overturned without much greater proof that it was erroneous than is present in this case. The trial judge correctly found that the verdict was properly suported by the evidence.

Thus having convinced the jury and the trial judge that his evidence was sufficient, the plaintiff was presented the added burden of having to prove his case yet again, to the Fifth Circuit. In *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985) this Honorable Court held:

> ...the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them persuade three more judges at the appellate level is too much. As the Court has stated in a different context, the trial on the merits should be "the main event"... rather than a "tryout on the road" *Wainwright v. Sykes, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977)*

In its opinion, the 5th Circuit quoted Boeing v. Shipman, 411 F.2d 365, 368 (5th Cir. 1969) in holding that a judgment notwithstanding verdict should be granted when:

> the facts and inferences point so strongly and overwhelmingly in favor of one party that the

court believes that reasonable men could not arrive at a contrary verdict.

In the instant case, reasonable men could and indeed did arrive at a verdict contrary to the decision of the Fifth Circuit. Furthermore, not only were these reasonable men, they were men chosen for their impartiality by the time tested and honored jury selection process. These reasonable men, these *jury*men, after having heard and seen the witnesses and the evidence offered by both sides first hand decided that plaintiff had offered sufficient evidence to support his allegations. The trial judge, also having heard and seen the witness and evidence first hand, ruled that there was indeed enough evidence to support the jury's verdict. As opposed to this "front line" observation of the evidence we have what Justice Tate, in his eloquent dissenting opinion on the admittedly different issues of appellate review of excessive awards[1] called "appellate judges secluded in their appellate chambers from the ongoing realities of everyday life."

The degree of seclusionn afforded appellate judges is, of course, necessary and desirable, but places them in a position better to judge law than facts. The primary finder of facts remains the judges and Juries of the trial courts.

In this case, there was sufficient evidence to sustain the verdict of the jury and the judgment of the trial court and it was error for the Court of Appeals for the Fifth Circuit of Louisiana to reverse that judgment. Certiorari should be granted, the decision of the Fifth Circuit Court of Appeals should be overturned and the decision of the trial court should be reinstated.

---

[1] *In re Air Crash Disaster Near New Orleans*, 767 F.2d 1151 (5th Cir., 1985)

In the alternative, in the interest of justice and fairness, this case should be remanded to the trial court, to afford plaintiff the opportunity to reassert his claim.

CONCLUSION

In this case, there was sufficient evidence to support the jury's verdict for plaintiff and the trial judge was correct in denying defendant's motion for a motion notwithstanding verdict. Therefore, it was error for the united States Fifth Circuit Court of Appeals to reverse the judgment of the trial court.

CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of this Honorable Court, herby certify that three copies of the Petition herein have been served upon respondent's counsel, Brian C. Misshore, Esq. by delivering the same to his offices at 21st floor Pan American Life Center, 601 Poydras Street, New Orleans, Louisiana 70130-6097, this 12th day of May, 1987.

_____

DANIEL E. BECNEL, JR.

APPENDIX A

Christopher THOMPSON
Plaintiff-Appellee,

v.

SOUTHERN PACIFIC TRANSPORTATION CO., d/b/a SOUTHERN PACIFIC RAILROAD CO., et al.
Defendants,

Monsanto Corporation,
Defendant-Appellant.

No. 86-3018
Fifth Circuit.

FEB 13 1987

Railroad worker brought action against owner of industrial plant site, alleging that porphyria was caused by exposure to dioxin at the site. The United States District Court for the Eastern District of Louisiana, Robert F. Collins, J., entered judgment in favor of worker, and owner appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that evidence was insufficient to establish link of causation between worker's alleged exposure to dioxin and development of worker's prophyria.

Reversed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before RUBIN, JOHNSON, and JONES, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

A railroad brakeman worked at various times during a three-year period aboard a train that entered an industrial plant site contaminated by dioxin. After he had been fired by the railroad for being intoxicated on the job, he sued the owner of the contaminated area contending that a disease from which he was suffering, porphyria, had been caused by his exposure to dioxin. The jury returned a verdict in his favor, but, finding that the worker had failed to offer any substantial evidence to support the thesis that his disease was caused by his exposurer, we reverse the judgment in his favor and enter judgment for the plant owner.

I.

Christopher Thompson's work as a breakman for the Southern Pacific Railroad often brought him to Monsanto's Luling, Louisiana plant which was served by the railroad. After he had been employed for three years, he was fired in 1981 for being intoxicated on duty. Soon thereafter, Thompson sued Southern Pacific and Monsanto, alleging that his occupational exposure to hexachlorobenzene or other chemicals at the Luling plant had caused his severe and disabling case of porphyria cutanea tarda. Porphyria cutanea tarda is an illness characterized by chronic skin lesions and abnormal liver function; it may be caused by administration of estrogens, consumption of alcohol, or exposure to certain chemicals. Thompson based his claim against Southern Pacific on the Federal

Employers' Liability Act and his claim against Monsanto on Louisiana negligence law.

While discovery was being conducted, Monsanto publicly announced that dioxin had contaminate a small area of the Luling plant site near the Southern Pacific railroad tracks. Monsanto linked the contamination to periods in 1965 and 1967 when the chemical 2,4,5—T, a precursor of dioxin, was loaded and unloaded at the plant. Meanwhile, discovery showed that no hexachlorobenzene had been found at the Luling facility. Thompson then contended that dioxin caused his porphyria.

On the eve of trial, Thompson settled his claim against Southern Pacific for $5,000. After hearing the evidence, the jury rendered a $200,000 verdict against Monsanto. Monsanto moved for a new trial, judgment notwithstanding the verdict, and a remittitur, but the district court judge denied all three motions. Monsanto appeals on the grounds that the verdict was not supported by sufficient evidence and that Thompson's counsel engaged in improper behavior during trial.

II.

Most federal courts apply a federal standard when evaluating the sufficiency of evidence in diversity cases.[1] A judgment notwithstanding the verdict should be granted when "the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary

---

[1] *Boeing Co. v. Shipman*, 411 F.2d 365, 368 (5th Cir. 1969)(en banc): SA J. Moore & J. Lucas, Moore's Federal Practice ¶50.06 (2d ed. 1986).

verdict."[2] A mere scintilla of evidence will not create a jury question; instead, "[t]here must be a conflict in substantial evidence."[3] Deferring fully to the jury's prerogatives in weighing conflicting evidence and in determining the credibility of witness,[4] we find a lack of substantial evidence to support the verdict, for Thompson did not introduce sufficient evidence at trial to establish a link of causation between his alleged exposure to dioxin at Luling and the development of his porphyria.

Thompson called several expert witnesses to support his theory of causation. One, a chemical engineer, described the chemical composition of dioxin and the methods of sampling soil that might be contaminated with dioxin. He further testified that dioxin in contaminating the soil can be ingested, inhaled, or absorbed into the body of an individual working nearby. The engineer did not testify, however, about Thompson's degree of exposure to dioxin; he did not know where Thompson worked at Luling or the amount of time Thompson spent at the plant site. In short, his testimony simply indicated that someone working around dioxin-contaminated soil might develop porphyria and described how that possibility could be established without specifically addressing Thompson's exposure. A good deal of his testimony, in fact, focused on reports of dioxin exposure at locations other than Luling. A second expert, a toxicologist, did testify that dioxin caused Thompson's porphyria. He based his opinion on the fact that Thompson worked at a site where dioxin was found

---

[2] *Id.* at 374; *Eyre v. McDonough Power Equipment, Inc.*, 755 F.2d 416, 419 (5th Cir. 1985).

[3] *Boeing*, 411 F.2d at 374-75.

[4] *Id.* at 375.

and therefore "definitely could have come into contact with it." He did not, however, have any knowledge about the amount or duration of Thompson's exposure. There was, then, an insufficient factual basis for his opinion.[5] On the other hand, Monsanto's toxicology expert testified that, in view of the dioxin measurements made at the site, Thompson would have received an exposure to dioxin less than 2% of the recommended maximum amount for residential areas, an exposure insufficient to cause porphyria. He further testified that Thompson's symptoms were not consistent with dioxin-induced prophyria: in all previous cases of porphyria associated with dioxin exposure, chloracne has accompanied the porphyria, and Thompson has never suffered from chloracne.

The testimony by the physicians called as experts also failed to substantiate the ultimate issue of causation—that dioxin caused Thompson's porphyria. A neurolgist, introduced by Thompson, stated that dioxin exposure *could* cause the kinds of symptoms that Thompson experienced, but did not offer an opinion as to what in fact had caused Thompson to suffer from the disease. While he did not believe it was caused by alcohol, he testified that he had insufficient information about the concentration of dioxin at Luling or the amount of time Thompson worked there to decide whether exposure to dioxin caused the porphyria.

Five other physicians testified, all of whom had treated Thompson for his porphyria, and none believed that dioxin had caused it. One of the doctors was qualified as an expert in the field of internal medicine with specialized training and work in the specific areas of liver diseases

---

[5] *Chlhoun v. Honda Motor Co.*, 738 F.2d 126, 131-32 (6th Cir. 1984).

and porphyria. He testified that, in his opinion, Thompson's illness was related to his consumption of alcohol and he too thought that Thompson's failure to develop chloracne excluded dioxin as the cause of the porphyria. Two of the other physicians, both specialists in internal medicine, attributed the illness to Thompson's alcohol consumption. The remaining two physicians either were not asked to give an opinion or had no opinion regarding causation.

Having found insufficient evidence to support the verdict, we need not reach Monsanto's claim of improper behavior by plaintiff's counsel.

For these reasons, wer REVERSE and enter judgment for the defendant.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
Nov. 6 1985

CHRISTOPHER THOMPAON	CIVIL ACTION
VERSUS	NO. 81-1512
MONSANTO CORPORATION	SECTION "C'(3)

* * * * * * * * * * * * * *

J U D G M E N T

The jury having duly rendered its verdict, accordingly;

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of plaintiff, Christopher Thompson, and against defendant, Monsanto Corporation, in the amount of $200,000.00 plus interest at the legal rate from the date of judicial demand and costs.

New Orleans, Louisiana, this 5th day of November, 1985.

LORETTA G. WHYTE, CLERK

By: /s/ illegible
CHIEF DEPUTY CLERK

Approved as to form:

/s/ Robert F. Collins
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY: Nov 6, 1985

MINUTE ENTRY
December 4, 1985
COLLINS, J.

Filed
Dec 5 1985

CHRISTOPHER THOMPSON CIVIL ACTION

VERSUS NO. 81-1512

SOUTHERN PACIFIC TRANSPORTATION
COMPANY, ET AL. SECTION "C"

* * * * * * * * * * * * * * * * * *

Monsanto Company has moved the Court for a judgment notwithstanding the verdict of the jury on the ground that the evidence presented at trial as to the causal link between Christopher Thompson's alleged exposure to dioxin and his alleged illness was not sufficient to create an issue upon which reasonable men could differ. Monsanto has also moved for a new trial and alternatively for remittitur on the grounds that the verdic t was against the weight of the evidence, the arguments and questions of counsel have prejudiced defendant's right to a fair trial, the verdict is unfair and amounts to a miscarriage of justice, the instructions to the jury were inadequate and misleading, and that the verdict was excessive. The Court has considered ıll the motions, has reviewed the evidence and has read the mnemoranda submitted by counsel. The Court concludes that the Judgment is proper, fully sup

Date of Entry: DEC 05 1985

ported by the evidence, and should stand. Accoridngly, the Court hereby DENIES the Motion for New Trial, for a Judgment Notwithstanding the Verdict, and for Remittitur.

A brief review of the evidence demonstrates that the Judgment was supported by evidence submitted at trial.

Clayton D. Callihan, Ph.D., an expert in chemical engineering and professor emeritus from the Louisiana State University School of Chemical Engineering, testified concerning chemical engineering principles, the composition of dioxin, methods for sampling soil that was contaminated with dioxin and methods of how an individual working in a plant where dioxin was found to exist might come into contact with dioxin, Dr. Callihan stated that the plaintiff could have come in contact with dioxin from breathing it, ingestion of dust particles or physical contact in the area where Christopher Thompson worked at Monsanto's chemical plant in Luling, Louisiana.

Joshua Carey, M.D., an expert in neurology, was of the opinion that the porphyria and convulsive disorder suffered by the plaintiff was compatible to an exposure to a toxin such as dioxin. Dioxin was found to exist at the Monsanto plant site from spillages which occured between November, 1965 and January, 1966 and May, 1967 to October, 1967.

Mrs. Thompson testified that the changes to her husband following his liver disease have been so great that it caused them to separate and that despite their best efforts they have not been able to have children. The plaintiff cannot work in the sunlight or in the cold due to the sensitivity of his skin.

Plaintiff testified that he would no longer be able to pass a company physical for certain types of employment. Also, it is undisputed that the plaintiff suffered from a rare liver disorder, PCT.

The jury instructions were not misleading or confusing simply because the jury wrote and asked certain questions. Considering the complexity of this case and the length of time it took to try the case, it is not unusual for the jury to have asked for clarification on certain issues. Nor is it unusual for juries to inquire as to what the term "proximate" means.

Based on the above evidence, review of the record, and other evidence introduced at trial, the Court finds that the verdict and the judgment are proper and fully supported by the record.

WHEREFORE, the Motion for New Trial, for a Judgment Notwithstanding the Verdict, and for Remittitur are hereby DENIED.

/s/ Robert F. Collins

UNITED STATES DISTRICT JUDGE

UNITED STATERS DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed:
Mar 12, 1987

CHRISTOPHER THOMPSON CIVIL ACTION

VERSUS NO. 81-1512

SOUTHERN PACIFIC TRANSPORTATION CO.
d/d/a SOUTHERN PACIFIC RAILROAD CO.,
ET AL SECTION "C"(3)

* * * * * * * * * * * * * *

J U D G M E N T

In accordance with the opinion of the United States court of Appeals issued as mandate on March 9, 1987;

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of defendant, Monsanto Corporation, and against plaintiff, Christopher Thompson, dismissing the complaint with prejudice, at plaintiff's cost.

New Orleans, Louisiana, this 12th day of March, 1987.

/s/ Robert F. Collins
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY: MAR 12 1987

(2)

Supreme Court, U.S.
FILED
JUN 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1822

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHRISTOPHER THOMPSON,
Plaintiff-Appellee-Petitioner

versus

SOUTHERN PACIFIC TRANSPORTATION CO., d/b/a SOUTHERN PACIFIC RAILROAD CO., ET AL,
Defendant

and

MONSANTO CORPORATION,
Defendant-Appellant-Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEMLE, KELLEHER, KOHLMEYER, DENNERY, HUNLEY, MOSS & FRILOT

Of Counsel

PAUL B. DEAL*
JOHN C. REYNOLDS
BRYAN C. MISSHORE
21st Floor, Pan American Life Center
601 Poydras Street
New Orleans, LA 70130
Telephone: (504) 586-1241
Counsel for Respondent

*Counsel of Record

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

17 pp

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in reversing the judgment of the District Court by finding that there was insufficient evidence of causation between Christopher Thompson's claimed exposure to dioxin and his development of the disease porphyria cutanea tarda.

TABLE OF CONTENTS

Question Presented for Review.....i
Table of Contents.....ii
Table of Authorities.....iii
Opinions Below.....1
Jurisdiction.....1
Statement of the Case.....1
Reasons for Denying the Writ.....2
Conclusion.....5
Certificate of Service.....7
APPENDIX A
Judgment of United States District Court, for the Eastern District of Louisiana, November 5, 1985.....A-1
APPENDIX B
Judgment of United States District Court for the Eastern District of Louisiana in Accordance with Mandate of United States Court of Appeals for the Fifth Circuit, March 12, 1987.....A-2
APPENDIX C
Questions Addressed by United States Court of Appeals for the Fifth Circuit to Counsel for Christopher Thompson, October 30, 1986.....A-3

TABLE OF AUTHORITIES

CASES PAGE

Boeing Company v. Shipman, 411 F.2d 365, 368-75 (5th Cir. 1969) (en banc).....3

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 43 S.Ct. 422, 67 L.Ed. 712 (1923).....4

Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed. 2d 75 (1967).....3,5

Rice v. Sioux City Cemetery, 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.Ed. 897 (1955).....4

United States v. Johnson, 268 U.S. 220, 227, 45 S.Ct. 496, 69 L.Ed. 925 (1925).....5

Rules

Fed.R.Civ.P. 50(b).....3

Rule 17, Rules of the Supreme Court of the United States.....4

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported in *Thompson v. Southern Pacific Transportation Co.*, 809 F.2d 1167 (1987).

The judgments of the United States District Court for the Eastern District of Louisiana are unreported and are reprinted as Appendices "A" and "B" hereof.

JURISDICTION

Jurisdiction of this Honorable Court has been invoked under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Christopher Thompson, petitioner, filed suit in the United States Court for the Eastern District of Louisiana against Southern Pacific Transportation Co. and Monsanto Company, respondent herein, on April 17, 1981. Petitioner alleges he was exposed to dioxin at Monsanto's Luling, Louisiana plant while in the employ of Southern Pacific, which exposure he contends caused his liver disease, porphyria cutanea tarda.

After trial on the merits, the jury rendered a verdict in favor of Thompson, and against Monsanto, which verdict was made the judgment of the Court on November 5, 1985. Post-trial relief having been denied, Monsanto sought relief in the United States Court of Appeals for the Fifth Circuit, which reversed the judgment of the District Court on February 13, 1987. The Fifth Circuit, deferring fully to the jury's prerogatives in weighing the evidence and determining the credibility of witnesses, found "a lack of substantial evidence to support the verdict, for Thompson did not introduce sufficient evidence at trial to

establish a link of causation between his alleged exposure to dioxin at Luling and the development of his porphyria." *Thompson v. Southern Pacific Transportation Co.*, 809 F.2d 1167, 1168 (5th Cir. 1987).

Petitioner now seeks redress in this Honorable Court.

REASONS FOR DENYING THE WRIT

THE PETITION FOR WRIT OF CERTIORARI IS WHOLLY WITHOUT MERIT AND REVEALS NO APPROPRIATE QUESTION WHICH ACTS AS A RECOGNIZED BASIS FOR THE EXERCISE OF THIS COURT'S DISCRETIONARY JURISDICTION TO GRANT A WRIT OF CERTIORARI HEREIN.

Respondent, Monsanto Company, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in this case, specifically, its opinion of February 13, 1987.

The sole question as formulated in the petition (*See* Petition at p. i) and the argument presented in support of the granting of a writ incorrectly suggests that the Fifth Circuit somehow failed to give sufficient deference to the jury's factual findings and verdict, substituting instead their own judgment to evaluate the evidence, thereby depriving the plaintiff of trial by jury.

A reading of the Fifth Circuit Opinion, however, shows clearly that the issue decided was not the correctness of the jury verdict, but rather whether or not the evidence presented at trial on behalf of the plaintiff was sufficient under the federal standard applicable in diversity

cases to allow the claim to go to the jury in the first place, or to support the verdict rendered.

Insufficiency of Evidence

The question of the sufficiency of evidence was specifically raised, briefed and decided upon by the Fifth Circuit. The decision rests squarely on the federal standard enunciated in *Boeing Company v. Shipman*, 411 F.2d 365, 368-75 (5th Cir. 1969) (*en banc*). The petition fails to raise any question of legal error and in fact acknowledges that an appellate court has the authority to reverse the lower court's denial of the defendant's motion for judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b). (*See* Petition at pp. 6-7). In fact, this Court has specifically approved of the procedural and substantive process followed by the Fifth Circuit in the present case under nearly identical circumstances in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed. 2d 75 (1967). Therefore, this petition presents no new or unresolved matters of importance which necessitate the issuance of a writ.

Since the petition fails to raise, and the record does not support, any argument that the Fifth Circuit committed any recognizable error of law, the petitioner merely argues that the appellate decision is erroneous, based on the alleged quality of the evidence presented at trial. The petition, in making any that self-serving argument, fails to supply this Court with record references on key factual points that support the argument made. Likewise, the plaintiff was unable to cite to the Appellate Court any credible, relevant evidence in the record on the causation issue when specifically requested to do so prior to and during oral argument. (*See* Appendix "C"). Therefore, the petition actually reflects the correctness of the Fifth Circuit's ruling that the plaintiff failed to meet the *Boeing* evidentiary standard, *supra*. The Fifth Circuit analyzed the record

and found that there was insufficient evidence to establish a casual link between the plaintiff's alleged exposure to dioxin and the porphyria disease.

Failure to Satisfy Requirements of Rule 17

The petition, in addition to being defective on its face in failing to clearly set forth the actual question sought to be reviewed, fails to show any appropriate grounds for the granting of a writ. None of the factors suggested in Supreme Court Rule 17 is present in this case. The petition does not seek certiorari review of any judicial conflict between a decision of this Court and a final judgment of any state or federal lower court, and clearly does not deal with a decision of a federal court of appeals in direct conflict with a decision of another appellate court on the same matter of federal law or on the same matter of general law.

Further, the petition makes no showing that the Court of Appeals departed from the accepted and usual course of judicial proceedings, and fails to raise any issue of such general importance which necessitates this Court's discretionary review. The concept of importance must, of course, relate to the importance of the issues "to the public as distinguished from" importance to the particular "parties" involved. *Rice v. Sioux City Cemetery,* 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.Ed. 897 (1955); *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 393, 43 S.Ct. 422, 67 L.Ed. 712 (1922).

Herein, there is no public agency involved; there is no statutory construction involved; there is no legal question involved; there is no numerosity involved. This case simply rests upon its own special facts and is of consequence primarily to the two litigants. Within that context, it is clear that this petition illustrates a fundamental misunderstanding of the scope of the completely discretionary certiorari powers of this Court. The purpose of writ

jurisdiction is not to give a defeated party another hearing merely because the party complains that the decision of the Court of Appeals is erroneous. As this Court has stated, "We do not grant a certiorari to review evidence and discuss particular facts." *United States v. Johnson*, 268 U.S. 220, 227, 45 S.Ct. 496, 69 L.Ed. 925 (1925). That is precisely what this petition seeks and is why denial is mandated.

No Other Grounds for Relief Exist

In asking this Court to grant certiorari, the relief which petitioner ultimately seeks is to have the sound decision of the Fifth Circuit Court of Appeals overturned and to have the trial court's judgment reinstated. Alternatively, the petition suggests in passing that the case should be remanded to the District Court for a new trial. The petition, however, does not suggest any grounds for this relief. There is no indication or argument that the record was insufficient or that any error was committed at trial to require review and the granting of a new trial. Further, it is noted that the petitioner failed to raise the issue of a "new trial" at the appellate level, nor did he seek a rehearing before the Fifth Circuit, even though that Court dismissed his claim in its entirety. Again, this Court has squarely ruled on this very point in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330, 87 S.Ct. 1072, 18 L.Ed. 2d 75 (1967). Therefore, this argument also fails to state grounds for the issuance of a writ.

CONCLUSION

The petition seeks to challenge the decision of the Fifth Circuit Court of Appeals which set aside the jury's verdict based on their finding that the evidence was insufficient as a matter of law to support the verdict. Clearly the Court of Appeals has the power to make such a determination. The petition fails to point to any legal error and

is completely devoid of any record references on key factual issues supporting the assertion that the Court of Appeals erred in finding the evidence presented to be legally insufficient. It is respectfully shown that there is no issue presented by this petition which necessitates the issuance of a writ of certiorari herein; therefore, the petition should be denied.

LEMLE, KELLEHER,
KOHLMEYER, DENNERY,
HUNLEY, MOSS & FRILOT

Of Counsel

PAUL B. DEAL,*
JOHN C. REYNOLDS
BRYAN C. MISSHORE
21st Floor, Pan American
Life Center
601 Poydras Street
New Orleans, LA 70130
Telephone: (504) 586-1241
Counsel For Respondent

*Counsel of Record

CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of this Honorable Court, hereby certify that three copies of the Opposition herein have been served upon counsel for petitioner, Daniel E. Becnel, Jr., by delivering same to his offices at 109 West Seventh Street, Post Office Drawer H, Reserve, Louisiana 70084, this 11th day of June, 1987.

_____

PAUL B. DEAL

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
Nov 6 1985

CHRISTOPHER THOMPSON	CIVIL ACTION
VERSUS	NO. 81-1512
MONSANTO CORPORATION	SECTION "C"(3)

* * * * * * * * * * * * *

J U D G M E N T

The jury duly rendered its verdict accordingly;

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of plaintiff, Christopher Thompson, and against defendant, Monsanto Corporation, in the amount of $200,000.00 plus interest at the legal rate from the date of judicial demand and costs.

New Orleans, Louisiana, this 5th day of November, 1985.

LORETTA G. WHYTE, CLERK

BY: /s/ illegeble
CHIEF DEPUTY CLERK

Approved as to form:

/s/ Robert F. Collins
UNITED STATES DISTRICT JUDGE

Date of Entry Nov 6 1985

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
Mar 12 1987

CHRISTOPHER THOMPSON — CIVIL ACTION
VERSUS — NO. 81-1512
SOUTHERN PACIFIC TRANSPORTATION CO.
d/b/a SOUTHERN PACIFIC RAILROAD CO.,
ET AL — SECTION "C"(3)

* * * * * * * * * * * * *

J U D G M E N T

In accordance with the opinion of the United States Court of Appeals issued as mandate on March 9, 1987;

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of defendant, Monsanto Corporation, and against plaintiff, Christopher Thompson, dismissing the complaint with prejudice, at plaintiff's cost.

New Orleans, Louisiana, this 12th day of March, 1987.

/s/ Robert F. Collins
UNITED STATES DISTRICT JUDGE

Date of Entry Mar 12 1987

APPENDIX C

UNITED STATES COURT OF APPEALS
Fifth Cricuit
October 30, 1986

TO: Counsel
SUBJECT: No. 86-3081 - Thompson v. Monsanto

After reviewing the briefs in this matter, the court had a few questions that at least one of the judges who will hear your argument knows in advance he would like to have answered or commented on in oral argument. Knowing that interruption of counsel to put these questions may interface with counsel's train of thought, and desiring also to give counsel at least some opportunity to reflect on the questions, we are submitting them to you. We suggest that you try to answer them as directly as possible during the course of your argument.

Of course, the fact that the court desires to know your answers to these questions must not be taken as an indication of the direction of the court's throughts or of the issues that the court considers decisive. Instead, they are part of the court's effort to understand the case as completely as possible.

You will likely be asked to answer other questions from members of the court as your argument proceeds. These, too, are designed merely to enable the court to understand your position. We hope that you will welcome the opportunity to give us as much information as possible.

The questions that we know at this time are the following:

For counsel for Thompson:

1. What evidence in the record indicates there was a reasonable probability that dioxin *did* cause, rather than *might* have caused, Thompson to suffer from porphyria?

2. Were the remarks mentioned on pages 24 to 29 of opposing counsel's brief proper or improper?

3. If some or all of them were improper, why is that not reason to order a new trial?

Mr. John C. Reynolds
Mr. Daniel E. Becnel, Jr.